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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

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In re A.M., a Person Coming Under the  
Juvenile Court Law.

YOLO COUNTY DEPARTMENT OF EMPLOYMENT  
AND SOCIAL SERVICES,

Plaintiff and Respondent,

v.

M.W. et al.,

Defendants and Appellants.

C067143

(Super. Ct. No.  
JV08500)

Mishell W., mother of minor A.M., appeals from orders of the juvenile court denying her petition for modification to reinstate reunification services. (Welf. & Inst. Code,<sup>1</sup> §§ 388, 395.) Mother contends the juvenile court abused its discretion in finding that it lacked authority to reinstate services after

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<sup>1</sup> Further undesignated statutory references are to the Welfare and Institutions Code.

the statutory period for reunification services had expired. We agree and shall reverse.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

In September 2008, minor was detained from his parents at age 11 months due to mother's substance abuse, mental health issues, criminal behavior and failure to protect minor from the father, who was arrested on a warrant. Mother claimed Indian ancestry and it was determined that she was a member of the Pit River Tribe of Burney, California. Minor was eventually enrolled as a member of the tribe.

The juvenile court sustained an amended petition in December 2008 and later ordered mother to participate in reunification services. The court continued services for mother at the six-month review hearing in August 2009 and set a 12-month review hearing for October 2009.

The social worker's review report recommended termination of services. The social worker characterized mother's mental health as "precarious at best" because she was not able to maintain any significant period of stability on medication. Mother's success in substance abuse treatment paralleled her periods of mental health stability. Mother tested positive for marijuana in August 2009. Mother visited minor regularly and visits were generally good with interactive play. The social worker recommended termination of services because mother was only recently becoming stable, attending counseling and participating in substance abuse treatment. Further, based on her history, mother was unlikely to sustain a significant period

of stability. At the continued review hearing in December 2009, the court ordered an additional six months of services and increased visits.

The next review report again recommended termination of services for the parents. Mother reported she was pregnant and due in September 2010. Minor had been in the same placement for 16 months. Mother was twice enrolled in, but did not complete, residential treatment, was in an outpatient program, and now felt she needed a higher level of treatment (although she previously stated she did not like residential treatment). Mother was discharged from her collateral programs when she entered residential treatment, so she could not complete other aspects of her plan. There were also concerns about mother's compliance with her medication regime. Mother had twice-weekly visits with minor and interacted appropriately. There were some concerns about mother's ability to parent minor in a community setting since the visit supervisor had to intervene and suggest ways for mother to interact with minor. The foster parents reported that, following the increase in visits, minor's post-visit behaviors escalated. Mother could not demonstrate her ability to live in the community and maintain her recovery and, despite domestic violence classes, had resumed a relationship with the father. After 18 months of services, mother was still unstable and unable to meet minor's needs.

The juvenile court set a contested 18-month review hearing in April 2010. The matter was heard over several days and, in

May 2010, the court terminated services and set a section 366.26 hearing.

The report prepared for the section 366.26 hearing recommended termination of parental rights as minor was adoptable. Minor, then three years old, was in good health and developmentally on target. He had no significant mental or emotional issues beyond some shyness. Mother's visits had been decreased to twice a month and the caretakers reported that reducing the frequency of mother's visits seemed to help minor's behavioral issues. Minor had been in his current placement nearly two years and his caretakers expressed a strong desire to adopt him. The report recommended termination of parental rights and a permanent plan of adoption. The court set a contested section 366.26 hearing for November 2010.

Mother filed a petition for modification prior to the section 366.26 hearing, seeking reinstatement of reunification services. She alleged changed circumstances because she had been clean and sober for a year, maintained attendance at A.A. meetings, and now had her infant daughter in her care. She had a temporary restraining order in place against the father and was avoiding contact with him. She was currently attending counseling, classes at Birth and Beyond, and was to begin a Native American domestic violence program. She was compliant with her medications and had stabilized emotionally. She had stable housing in her own residence. She alleged she had a close and loving relationship with minor. The court set the petition for hearing in November 2010.

At the hearing, following the presentation of evidence in the form of multiple witnesses, mother requested an additional six months of services. The court indicated it would grant additional services if it were legally possible, citing mother's increased support and favorable housing situation, but expressed concern that it lacked the authority to extend services past the 18-month statutory limit. The court permitted the parties to brief the issue. When the hearing resumed in December 2010, the court denied the petition for modification, concluding there was no legal authority to extend services past the 18-month time limit described in section 361.5, subdivision (a)(3) and section 366.26.

The court then considered the section 366.26 issues. The parties clarified that the customs of the Pit River Tribe dictated that if parental rights were terminated, the minor would lose his membership in the tribe if not adopted by a tribal member. The court declined to terminate parental rights, found guardianship was in the minor's best interests, and set visitation for mother at once a month.

#### **DISCUSSION**

Mother contends the juvenile court abused its discretion in denying her section 388 petition for modification, because it erroneously concluded it lacked the authority to grant the petition if the consequence were to extend services beyond the statutory maximum of 18 months.

A parent may bring a petition for modification of any order of the juvenile court pursuant to section 388 based on new

evidence or a showing of changed circumstances.<sup>2</sup> "Section 388 plays a critical role in the dependency scheme." (*In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1506 (*Hunter S.*)). Each stage in the dependency process serves a purpose, however; all are part of the overall process and no stage can be considered in a vacuum. (*Hunter S.*, *supra*, 142 Cal.App.4th at p. 1507.)

When considering the constitutionality of section 366.26, the California Supreme Court in *In re Marilyn H.* (1993) 5 Cal.4th 295, recognized the importance of section 388 in satisfying due process and fundamental fairness. Our Supreme Court stated that "throughout the reunification period *and thereafter*, the parent has the continuing right to petition the court for a modification of *any* of its orders based upon changed circumstances or new evidence pursuant to section 388." (*In re Marilyn H.*, *supra*, 5 Cal.4th at pp. 308-309, *emphasis added*.) Thus, section 388 provides an "escape mechanism" to allow the juvenile court to consider new information prior to terminating parental rights. (*Id.* at pp. 309-310.)

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<sup>2</sup> Section 388 provides, in pertinent part: "Any parent . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of the court previously made or to terminate the jurisdiction of the court. . . . [¶] If it appears that the best interests of the child may be promoted by the proposed change of order, recognition of a sibling relationship, termination of jurisdiction, or clear and convincing evidence supports revocation or termination of court-ordered reunification services, the court shall order that a hearing be held . . . ."

"*Marilyn H.* makes clear that reunification pursuant to section 388 must remain a viable possibility even after the formal termination of reunification services in a 12- or 18-month review if there is, as the court put it, a 'legitimate change of circumstances.'" (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529, internal cites omitted, [abuse of discretion in denying a 388 petition brought after the 18-month review hearing].) The section 388 petition is "the final opportunity available to a parent to demonstrate the possibility circumstances may have changed enough to warrant further reconsideration of reunification." (*Hunter S., supra*, 142 Cal.App.4th at p. 1508 [reversing denial of a 388 petition brought after services were terminated and the minor was in guardianship pending adoption].)

It is clear from the foregoing authorities that the juvenile court has the authority to entertain a petition for modification pursuant to section 388 after termination of reunification efforts at an 18-month review hearing.

Determination of a petition to modify is committed to the sound discretion of the juvenile court and, absent a showing of a clear abuse of discretion, the decision of the juvenile court must be upheld. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319; *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.) Here, however, the court, believing it lacked *authority* to grant the reinstatement of services sought by mother's section 388

petition due to the number of months mother had already been extended services, failed to exercise its discretion to determine the merit or lack thereof of the petition. Failure to exercise discretion is an abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847-848; *Kim v. Euromotors West/The Auto Gallery* (2007) 149 Cal.App.4th 170, 176-177 [judge incorrectly believed there could be no prevailing party when the parties agree to pretrial settlement and failed to exercise discretion to determine if plaintiff prevailed]; *People v. Orabuena* (2004) 116 Cal.App.4th 84, 99 [judge did not believe he had discretion to dismiss misdemeanor under Penal Code section 1385 and did not weigh the relevant factors].)

Because the juvenile court abused its discretion by failing to exercise it in deciding to grant or deny the section 388 petition, we must reverse. In conducting a new hearing on the section 388 petition, the juvenile court must carefully consider the *current* circumstances of both mother and minor in determining and considering the facts supporting the findings necessary to grant mother's modification petition--changed circumstances and best interests of the child.

#### **DISPOSITION**

The order of the juvenile court denying mother's petition for modification is reversed and the case remanded for a new hearing. At the hearing, the court must consider both minor's and mother's current circumstances in determining whether both



criteria necessary to grant a modification of its prior order  
exist.

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DUARTE, J.

We concur:

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BLEASE, Acting P. J.

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HULL, J.